Hon Mofokeng J.

CRI/A/99/82

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MASELLOANE LEBAJOA Appellant

v

R E X Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 30th day of March, 1983.

The appellant was on 18th October, 1982 charged with theft of money before the Subordinate Court of Thaba-Tseka on the allegation that between 15th April, 1981 and 21st January, 1982 and at or near Thaba-Tseka in the district of Thaba-Tseka, she wrongfully and unlawfully stole M930 from the Lesotho Government which money the appellant was holding in trust for the said Lesotho Government.

The appellant pleaded guilty to this charge and the prosecution accepted the plea when the provisions of sec. 240(b) of the Criminal Procedure and Evidence Act 1981 were invoked. The facts as outlined by the prosecutor disclosed that during the period in question, the appellant was employed by the Lesotho Government and deployed in the Ministry of Justice as Court Clerk at Thaba-Tseka Central Court. As Court Clerk, one of appellant's responsibilities was to collect court monies which were to be deposited with the Sub-Accountancy on behalf of her employer, the Lesotho Government.

When on 24th May, 1982 appellant's books of account were checked, it was found that she had been collecting money which was never deposited with the Sub-Accountancy and there was a general deficiency in the amount of about M930. Appellant's explanation for the deficiency was that an amount of M300 was shortage which occurred while a T.C.A. (Temporary Clerical Assistant) officer, one Kananelo Kokome, was acting as Court Clerk during her absence on leave.

2/ Another .....

Another M300 was borrowed by her Court President, one Mahomo. Her own shortage was the rest of the deficient money which she used for her own interests. The appellant was subsequently cautioned and charged as aforementioned.

The appellant admitted the facts to be correct and added that M300 was shortage created by Kananelo Kokome during her absence, a further M300 was borrowed by the Court President and she was responsible for the deficiency in the amount of M330. The magistrate returned a verdict of guilty as charged.

It has been argued before me that appellant's admission of the facts as outlined was not an unequivocal one and the magistrate should have altered the plea of guilty to that of not guilty and allowed evidence to be called. The reason for this argument was because of what the appellant added to her admission of the facts.

It may be observed that a careful examination of what the appellant added to her admission of the facts is in fact nothing but a repetition of the very facts that had been outlined by the prosecutor and, in my view, does not in any way change appellant's admission of those facts. The argument cannot therefore be sustained and it is accordingly rejected. It was further argued that on the evidence, the accused cannot be responsible for theft of the money that was borrowed by the Court President and the one which formed the shortage created by Kananelo Kokome. I am inclined to concede that appellant cannot justly be held responsible for the shortage created by Kananelo during her (accused's) absence on leave. However, as regard the money she admittedly lent to the Court President, this was clearly an unlawful borrowing which is a criminal offence under the provisions of sec. 345 of the Criminal Procedure and Evidence Act 1981. She cannot therefore escape liability. The appellant herself admitted to have used the rest of the deficient money for her own interests and there was no suggestion that she had been authorised to do so.

Sec. 267 of the Criminal Procedure and Evidence Act 1981, under the provisions of which the appellant was charged, provides:

> "267 (1) Upon the trial of a person charged with theft
> (a) while employed in any capacity in the public service or by the Government, or money or any other property, which belongs to the Government or which came into his possession by virtue

of his employment; or

b) while a clerk, servant or agent, of money or any other property which belongs to his employer or principal, or which came into his possession on account of his employer or principal,

an entry in any book of account kept by the accused or kept under or subject to his charge or supervision, purporting to be an entry of the receipt of any money or other property shall be evidence that the money or other property so purporting to have been received was so received by him.

(2) It shall not be necessary, on the trial of a person charged with an offence referred to in sub-section (1), to prove the theft by the accused of any specific sum of money if on the examination of the books of account or entries kept or made by him or kept or made in, under or subject to his charge or supervision, or by any other evidence there is proof of a general deficiency and if the court be satisfied that the accused stole the deficient money or any part of it."

(my underlining)

I have underscored the words "or any part of it" to indicate that, in my view, even if she cannot be held responsible for the shortage of M300 admittedly created by Kananelo Kokome during her absence on leave, the appellant can be held responsible for part of the deficiency or the amount which she herself admittedly used for her own interests and that which she unlawfully lent to the Court President.

As I see it, the only problem is the wording of the trial magistrate's verdict of "guilty as charged". which, in my view, implies that the appellant is responsible for the whole deficiency, i.e. including the amount of M300 which, according to the facts outlined by the prosecution and admitted to be correct by the appellant, is the shortage created by Kananelo Kokome during the appellant's absence on leave. The significance of this lies in the fact that if execution were to be levied against her in terms of sec. 322 of the Criminal Procedure and Evidence Act, supra, the appellant would have to pay the whole amount of the deficient money. That, in my view, would no doubt be inequitable for the total deficiency includes M300 which is shortage admittedly created by Kananelo Kokome and for which the appellant cannot justifiably be held responsible.

4/ Be that as it may, ..

Be that as it may, following her conviction, the appellant was sentenced to pay a fine of M200 or, in default of payment of the fine, to serve 10 months imprisonment, half of which was suspended for 2 years on conditions. The proceedings were sent for review when the sentence imposed by the trial magistrate was set aside and that of 2 years imprisonment substituted therefor by the High Court.

On 17th November, 1982, the appellant noted an appeal not against her conviction but only against the sentence "imposed by the Thaba-Tseka magistrate's court." It may be observed that if the appellant were to be believed that she was appealing against the sentence imposed by the haba-Tseka magistrate's court, then her noting of appeal was clearly out of time. She was convicted on 18th October, 1982 and the appeal was only noted on 17th November, 1982 - almost a month after the date on which she had been sentenced. No application for condonation of late noting of appeal has been filed with this Court. Rule 1(1) of Order No. XXXV of the Subordinate Rules - High Commissioner's Notice No. 111 of 1943 - provides :

> "an accused person wishing to appeal against any conviction or sentence in a criminal case shall note his appeal within fourteen days after such conviction or sentence by lodging with the clerk of the court a written statement setting out clearly and specifically the grounds on which the appeal is based."

It is more probable that the appeal is against the enhenced sentence of 2 years imprisonment imposed on review which sentence, the appellant must have come to know sometimes after the 18th October, 1982.

Be that as it may, the grounds on which the appellant bases her appeal are <u>firstly</u>, that after she had been convicted and before the sentence was passed, she explained to the magistrate that the shortage of money for which she could personally account for amounted to M300 and that it had been borrowed by the Court President and that the rest of the money disappeared in the hands of Kananelo Kokome while she (appellant) was away on leave. <u>Secondly</u>, that she had at first pleaded "not guilty" and upon that the magistrate proceeded to question her as to who was the keeper of the books and when she explained that she was the

5/ one, the .....

one, the magistrate advised her that she was then responsible for all the missing funds and she could not escape responsibility. She then pleaded "guilty". Thirdly, that on sentencing her the court did not take into account the fact that she was not responsible for some of the money that formed the general deficiency, and that the court overlooked the fact that hers was not strictly a case of theft but that of carelessness regarding the proper care of public funds.

I do not think the appellant is being candid with this Court in her first ground of appeal in saying she explained to the court that the only money that she could be held responsible was the M300 which she had lent to the Court President and that the rest of the money disappeared in the hands of Kananelo Kokome. The record of proceedings clearly shows that she explained to the court that only an amount of M300 was the shortage created by Kananelo during her (appellant's) absence on leave. She lent another M300 to the Court President and herself used the rest for her own interests. I have already indicated that I take the view that in law appellant had no right to lend the M300 to the Court President and she is therefore liable for the deficiency created by the amount she had unlawfully lent to the Court President as well as the rest of the money which she admittedly used for her own interests. Appellant's explanation was borne out by the facts as outlined by the prosecution.

As regards her second ground of appeal, the appellant's story that she had first pleaded not guilty to the charge and on the suggestion of the trial magistrate, she changed her plea to that of guilty cannot be supported by the record of proceedings. In his reasons for judgment, the magistrate denies the suggestion that he in anyway compelled the appellant to plead guilty to the charge. All that he did was to explain fully to the appellant the charge she was facing under section 267 of the Criminal Procedure and Evidence Act 1981 and this he was in law empowered to do - see sec. 150(c) of the Criminal Procedure and Evidence Act 1981. It may be mentioned at this juncture that the trial magistrate is a magistrate of First Class powers with experience on the bench. I consider it highly incredible that he could have compelled the appellant to plead guilty to an offence against which she was charged. In any event the appeal is against the sentence and not the conviction and for that reason I can see no relevance in this ground of appeal.

6/ It is conceded ...

It is conceded that the fact that the appellant is not responsible for the money that has admittedly disappeared in the hands of Kananelo Kokome was apparently not taken into consideration for purposes of sentence. This in my view was an unfortunate omission. However, notwithstanding this the type of offence with which the appellant has been convicted is far too rampant in this country and calls for adequate sentence if only its monotonous repetition were to be kept in check.

For this reason I am of the opinion that the sentence of 2 years imprisonment imposed upon the appellant on review should not be disturbed. The magistrate's verdict of "guilty as charged" is however, amended to read "guilty as charged in respect of M630" which is the difference between M930, the total general deficiency of which the appellant was charged, and M300 admittedly lost by Kananelo Kokome.

The appeal is dismissed. In the descretion of this Court the appellant is to be refunded her appeal deposit.

B.K. MOLAI
JUDGE

30th March, 1983.

For Appellant : Mr. Maqutu.
For Respondent : Mr. Peete.